Petition

Office - Supreme Court, U.S.
FILED
NOV 2 1981
ALEXANDER

81-842

No.

IN THE

Supreme Court of the United States

October Term, 1981

LEON HOLMAN, JR.,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH SMUKLER*
One East Penn Square Building
Philadelphia, PA 19107
Attorney for Petitioner

Of Counsel:
MEYER, LASCH, HANKIN & POUL

*Counsel of Record

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTION PRESENTED

In an action under the Federal Employers' Liability Act, where the issue of loss of future earning power has been submitted to the jury, may the Court refuse to admit testimony on or argument concerning effects of future inflation, loss of purchasing power and future productivity increases in determining any such loss of future earning power.

SUBJECT INDEX

	Page
Question Presented	i
Table of Citations	iii
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting Writ	4
Conclusion	9
Appendix "A"—Order of District Court	A1
Appendix "B"—Judgment Order of Circuit Court	A3
Appendix "C"—Order Sur Petition for Rehearing to Circuit Court	A4
Appendix "D"—Federal Employers' Liability Act	A5

TABLE OF CITATIONS

Cases: Page

Autowest, Inc. v. Peugeot, Inc., 435 F. 2d 556 7

Bach v. Penn Central Transportation Company, 502 F. 2d 1117 ..... 4, 5, 8

Burlington Northern, Inc. Boxberger, 529 F. 2d 284 ..... 4, 5

Doca v. Marina Mercante Nicanaguense, S. A., 634 F. 2d 30 ..... 4, 6, 8

Feldman v. Allegheny Airlines, Inc., 524 F. 2d 384 ..... 7, 8

Morvant v. Const. Aggregates Corp., 570 F. 2d 626 5

Norfolk and Western Railway v. Liepelt, 444 U. S. 490 ...4, 5, 8, 9

Quilter v. Elgin, Joilet and Eastern Railway Company, 409 F. 2d 338 ..... 4, 6

Riha v. Jasper Blackburn Corp., 516 F. 2d 840 9

Steckler v. United States, 549 F. 2d 1375 ..... 4, 6

United States v. English, 521 F. 2d 63 ..... 5, 6

Statutes:

28 U. S. C. Section 1254(1) 2

Federal Employers' Liability Act (45 U. S. C.):

Generally ..... i, 3

Sec. 51 et seq. 2

No.

IN THE

Supreme Court of the United States

LEON HOLMAN, JR.,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Leon Holman, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered July 15, 1981 and the Petition for Rehearing and for Rehearing En Banc, denied August 13, 1981.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania entered November 19, 1980 is not reported, and appears as Appendix A.

The Judgment Order of the United States Court of Appeals for the Third Circuit entered July 15, 1981 is not reported and appears as Appendix B. The opinion of the United States Court of Appeals for the Third Circuit, denying Petition for rehearing, was entered August 13, 1981 is not reported and appears as Appendix C.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on July 15, 1981 (Appendix B) and the Petition for Rehearing was denied by Order entered August 13, 1981 (Appendix C).

The Jurisdiction of the Supreme Court is invoked under 28 U. S. C. Section 1254(1).

The basis for Federal jurisdiction in the District Court was the Federal Employers' Liability Act (45 U. S. C. 51-56).

STATUTE INVOLVED

The subject action arose and was determined under the provisions of the Federal Employers' Liability Act (45 U. S. C., Sec. 51, et seq.), which is set forth in Appendix D.

STATEMENT OF THE CASE

This is an action for damages brought under the Federal Employers' Liability Act. A general verdict was returned in favor of the Plaintiff in the amount of $10,000.00 and judgment was entered thereon. Plaintiff's timely Motion for New Trial was denied. A timely appeal was filed with the United States Court of Appeals for the Third Circuit which was denied without opinion as was the Petition for Rehearing.

The earning loss claimed for the approximate two years between the happening of the accident and the date of trial was approximately $30,000.00. The claimed loss of future earning power was in excess of $15,000.00 per year for a work expectancy of 34 years or $510,000.00.

During the course of the trial, Plaintiff specifically requested the opportunity to present testimony of and argument on the effect of future inflation and consequent loss of purchasing power on the award of future damages. The issue of loss of future earning power was submitted to the jury but the Trial Judge refused to permit any testimony on the effect of future inflation and consequent loss of purchasing power on the award of future damages or argument to be made on this issue.

Plaintiff took a specific exception subsequent to the charge, to the refusal to charge on the issue of inflation and consequent loss of purchasing power on the award of future damages.

As a result of the failure of the Trial Judge to permit testimony or argument on the issue of inflation in determining loss of future earning power, Plaintiff's verdict may have been diminished by an indeterminable amount.

REASONS FOR GRANTING THE WRIT

The decision affirming the trial court's action under the record in this case involves an important question of substantive law under the Federal Employers' Liability Act which is in direct conflict with the decisions of other courts of appeals on the same matter.

(1) *Burlington Northern, Inc. v. Boxberger*, 529 F. 2d 284 (Ninth Circuit—1975)

(2) *Bach v. Penn Central Transportation Company*, 502 F. 2d 1117 (Sixth Circuit—1974)

(3) *Doca v. Marina Mercante Nicanaguense S. A.*, 634 F. 2d 30 (Second Circuit—1980)

(4) *Quilter v. Elgin, Joliet and Eastern Railway Company*, 409 F. 2d 338 (Seventh Circuit—1969)

(5) *Steckler v. United States*, 549 F. 2d 1375 (Tenth Circuit—1977)

Further, it is in conflict with the clearly indicated approval of the Supreme Court, permitting the inclusion of inflation estimates in future wage loss awards. *Norfolk and Western Railway v. Liepelt*, 444 U. S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980).

As stated in *Doca, supra*, 734 F. 2d at 36:

> "Though the Supreme Court has yet to rule definitively on the issue, it clearly indicates its approval of including inflation estimates in future wage loss awards in *Norfolk and Western Railway v. Liepelt*, supra."

Pragmatically, the determination of loss of future earning power depends upon two equally uncertain variables. A Plaintiff's recovery is not taxable; hence, an

award of the full amount of such future loss (even when reduced to present worth) will be *excessive* to the extent that he or his widow will theoretically receive a gross amount instead of the net amount after taxes. The difficulties with meeting this practical problem have been carefully set out, *Liepelt, infra.* Equally from a practical standpoint, it is clear that the net amount (after taxes) awarded to the Plaintiff or his widow will be *inadequate* to the extent that future inflation will reduce the purchasing power of the award. The difficulties with meeting this practical problem have also been carefully set out in the decisions to which we will refer.

The Plaintiff contended at trial that the certainty of the effect of future inflation and the consequent loss of purchasing power of the award is of equal impact in arriving at an "adequate award" as is the certainty of future taxation and is not "too speculative or complex" for jury consideration.

Courts of Appeals of other Circuits which have anticipated the *Liepelt* decision have concurrently held that both issues are pertinent for jury consideration. In *Burlington Northern, Inc. v. Boxberger, supra,* 529 F. 2d at 293, the Ninth Circuit approved the income tax deduction while making clear that the effect of inflation must be taken into account (see also *United States v. English,* 521 F. 2d 63). In *Morvant v. Const. Aggregates Corp.,* 570 F. 2d 626 at 631, following *Bach v. Penn Central Transportation Co,* 502 F. 2d 1117, the Sixth Circuit held that "it was altogether appropriate for the jury to consider future increases or decreases in the purchasing power of money in making an award based upon the projected future earnings of the decedent." It said at 632:

> "If a jury is not permitted to consider decreases in purchasing power of money, appellant would be woefully damaged if inflation should continue at its

present rate or at any other substantial rate. Some consideration of probabilities is inevitable in any fair award of damages."

In *Steckler v. United States*, *supra*, at 1378, the Tenth Circuit held:

"In our opinion, the best rationale is contained in the opinion of Senior Circuit Judge Barnes in the Ninth Circuit case of *United States v. English*, wherein the Court . . . approved the trier of fact taking into account estimated changes in the purchasing power of money . . . the worth of this approach is found in its coming to careful grips with the inflation trends and with the problem of discounting the ultimate inflated sum (to be supported by reliable evidence) so as to reduce it to its present value."

In the *Quilter* case, *supra*, at Page 341, the Seventh Circuit in upholding Plaintiff's verdict, stated, "they (the jury) also could have considered the pattern of steadily increasing wages and the decreasing purchasing power of our currency."

The most recent decision in the Federal Courts directly in point is *Doca, supra*, where the Court held that inflation should be considered in estimating the present value of lost future wages.

The Court, therein, reviewed this issue and stated in support of its opinion, Pages 35-36:

"Among other courts there has been a growing recognition that inflation should be taken into account in damage calculations. At least four federal Courts of Appeals have explicitly so ruled, (citing cases), as have a number of state courts, (citing cases). In addition, the commentators generally favor this position. (Citing periodicals)."

That Court also specifically answered all the arguments generally raised in opposition to taking inflation into account. As to the usual argument that it is too speculative, that Court stated at Page 38:

> "The principal argument advanced against taking inflation into account is that it is too speculative. There can be no doubt that predicting next year's inflation rate is at least as hazardous a task as forecasting next year's weather. This concern about speculation persuades us to be rather cautious in determining the way in which inflation should be taken into account, but, for three reasons, is not sufficient to preclude any adjustment for inflation. First, the law of damages frequently recognizes the need to make some predictions about the future, despite the uncertainties of doing so. Estimates of lost future profits are an obvious example. See *Autowest, Inc. v. Peugeot, Inc.*, 435 F. 2d 556, 564-67 (2d Cir. 1970). Second, since discounting future lost wages to present value uses an interest rate that reflects inflation, the issue is not whether inflation is too speculative to be considered at all; it is whether inflation, as a component of interest rates, should be considered for the Defendant (by discounting at the prevailing interest rate) but ignored for the Plaintiff (by rejecting any compensating adjustment for inflation).
>
> Finally, and most important, as *Feldman* illustrates, it is entirely feasible to take inflation into account without making any prediction as to the specific level of future inflation rates. All that is needed is a prediction that in the future inflation rates will bear approximately the same relationship to long-term interest rates that they have in the past. Essentially the only premise for that prediction is that over the

course of years investors in long-term bonds will demand returns that reflect the prospects of future inflation. They may guess wrong in some years and accept rates that fail to keep pace with inflation. 'Yet common sense suggests,' as Judge Friendly has pointed out, 'that investors will not tolerate such a situation indefinitely.' *Feldman*, supra, 524 F. 2d at 392. These considerations persuade us that inflation is not too speculative to be taken into account in determining awards for future lost wages. See *Norfolk and Western Railway v. Liepelt*, supra."

The conclusion is inescapable that when an admittedly "speculative" subject such as the impact of future taxation is made the subject of jury consideration (as *Liepelt* has made it) any reason for excluding the no more "speculative" subject of inflation and reduction of purchasing power has been nullified. Our Courts should be as jealous in preventing an inadequate award to the injured party or his widow as they are in preventing an excessive award against the tortfeasor.

The Defendant has argued that Plaintiff produced no evidence on the issue of inflation or loss of purchasing power of money. This argument, however, goes to the question of *how* inflation should be considered and not the question here presented; namely, *Should* inflation be considered?

No particular method by which inflation should be taken into account in estimating lost future wages, is required. *Doca, supra,* at 39.

Indeed, one of the permitted alternate methods used in determining how inflation should be considered, *forbids* evidence, but permits the fact-finder to apply his own knowledge and prediction in estimating a future inflation rate. See *e.g., Bach v. Penn Central Transportation Co., supra,* 502 F. 2d at 1122-23.

Another permitted alternate method permits the fact-finder to apply his own knowledge but also permits but does not require expert testimony on this issue. See *e.g.*, *Riha v. Jasper Blackburn Corp.*, 516 F. 2d 840, 845 (Eighth Circuit—1975).

In addition, the Trial Judge ruled before all the evidence was presented, that no testimony or argument would be permitted on this issue. Hence, the Plaintiff was not given the opportunity to produce such evidence had he desired to do so.

The question presented by this case is of recurrent significance in Federal Employers' Liability Act cases in view of the *Liepelt* opinion. To require consideration of tax consequences in determining loss of future earning power and deny consideration of inflation and reduction of purchasing power is unjust.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH SMUKLER
Attorney for Petitioner,
Leon Holman, Jr.

Of Counsel:
MEYER, LASCH, HANKIN & POUL

APPENDIX "A"

Opinion of the United States District Court

ORDER

(Filed November 18, 1980)

Upon consideration of Plaintiff's motion for a new trial and the briefs of counsel submitted thereto, it appearing that:

(1) There was evidence upon which the issue of contributory negligence was required to be and was properly submitted to the jury.

(2) Hoffman v. Sterling Drug Company, 485 F. 2d 132 (3rd Cir. 1973) remains the law of this circuit precluding juries from assessing damages for future losses based on general inflationary trends,

(3) plaintiff proffered no evidence of any inflationary trend but merely sought to argue the effect of inflation to the jury in its consideration of damages for the future,

(4) the extent and seriousness of Plaintiff's low back injury were in severe dispute from the evidence,

(5) the verdict in favor of Plaintiff in the sum of $10,000.00 is not, as a matter of law, inadequate so as to require or justify the grant of a new trial.

Accordingly, the motion for a new trial is DENIED and DISMISSED.

ENTERED: _____

By THE COURT:

_____
Donald W. VanArtsdalen, Judge

CLERK OF COURT
November 18, 1980

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1033

LEON HOLMAN, JR.,
Appellant

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK

(Civil No. 77-3799—E. D. of Pa.)

Submitted Under Third Circuit Rule 12(6)
July 14, 1981

BEFORE: SEITZ, *Chief Judge*, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges.*

Judgment Order

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By THE COURT,

ATTEST:

(Chief Judge)

DATED: July 15, 1981

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1033

LEON HOLMAN, JR.

Appellant

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK

(Civil Action No. 77-3799)

Sur Petition for Rehearing

PRESENT: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*, and VAN DUSEN, *Senior Circuit Judge*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

(Chief Judge)

DATED: August 13, 1981

APPENDIX "D"

Federal Employers' Liability Act (45 U. S. C. 51)

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia and any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of

this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

April 22, 1908, c. 149 § 1, 35 Stat. 65; August 11, 1939, c. 685, § 1, 53 Stat. 1404.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 20 1981
ALEXANDER L. STEVAS,
CLERK

81-842

No.

IN THE

Supreme Court of the United States

October Term, 1981

LEON HOLMAN, JR.,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD L. GOERWITZ, JR.*
SWARTZ, CAMPBELL & DETWEILER
1700 Land Title Building
100 South Broad Street
Philadelphia, PA 19110
Attorneys for Respondent

* Counsel of Record

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-6711

COUNTERSTATEMENT OF QUESTION PRESENTED

Does the Trial Court commit reversible error in refusing to permit argument concerning the effect of future inflation where no evidence was offered relevant to that issue?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	3

TABLE OF AUTHORITIES

	Page
Heckman v. Federal Press Co., 587 F. 2d 612 (3d Cir. 1978)	2
Hoffman v. Sterling Drug Co., 485 F. 2d 132 (3d Cir. 1973)	2

COUNTERSTATEMENT OF THE CASE

This is an action for damages brought under the Federal Employers Liability Act. A general verdict was returned in favor of the plaintiff in the amount of $10,000 and judgment was entered thereon. Plaintiff's motion for a new trial was based upon the ground that "the learned trial judge erred in failing to permit evidence or argument by plaintiff regarding inflation and decreasing purchasing power of money."

The record shows that plaintiff's counsel at no time offered any evidence with respect to the effects of inflation, plaintiff's counsel has not alluded to any place in the record where such an offer was made and there was none as the Court held.

The only mention by counsel for plaintiff of inflation was a request to argue the issue made after the close of plaintiff's case during a conference on points for charge which was refused by the trial judge.

REASONS FOR DENYING THE WRIT

There are different approaches to inflation by various circuits as pointed out by counsel for petitioner. The method of handling this issue by the Third Circuit as set forth in its opinions in the cases of *Hoffman v. Sterling Drug Co.*, 485 F. 2d 132 (3d Cir. 1973) and *Heckman v. Federal Press Co.*, 587 F. 2d 612 (3d Cir. 1978) i.e. to require competent evidence is an appropriate method of handling the issue.

Contrary to petitioner's allegations there was never any offer to produce any testimony with respect to the issue of inflation, counsel for petitioner has not pointed to any such offer in the record and the Court below has held that there was no such offer.

There is no issue in this case requiring consideration and resolution by this Court.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD L. GEORWITZ, JR.,
SWARTZ, CAMPBELL & DETWEILER
Attorneys for Respondent,
National Railroad Passenger Corp.